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No. 89-589

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

CBS INC.,

Petitioner,

v.

MARTIN W. BERDA and LINDA BERDA,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF GENERAL MOTORS CORPORATION IN SUPPORT OF THE PETITIONER

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE OF GENERAL MOTORS CORPORATION IN SUPPORT OF THE PETITIONER

Pursuant to Rule 36.2 of the Rules of this Court, General Motors Corporation ("GM") respectfully moves for leave to file the attached brief *amicus curiae* in support of the petitioner. Counsel for petitioner has consented to the filing of this brief but counsel for respondents has withheld consent.

GM's interest in this case arises from the fact that it has recently sought this Court's review in *Wells* v. *General Motors Corp.*, 881 F.2d 166 (5th Cir. 1989), petition for cert. filed, No. 89-____ (Dec. 27, 1989). In *Wells*, the court of appeals held, *inter alia*, that Section 301 of the Labor

Management Relations Act did not pre-empt a state law fraud and misrepresentation action related to "an extraneous promise" allegedly made to employees who were covered by a collective bargaining agreement. The alleged "promise" concerned the eligibility of the employees for future employment if they elected to leave their job pursuant to a negotiated Voluntary Termination of Employment Plan.

The petitioner in this case raises a closely related question: whether Section 301 pre-empts state law claims related to alleged pre-employment promises made to an individual who subsequently becomes a member of a bargaining unit covered by a collective bargaining agreement. Although resolution of that question would not necessarily resolve the Section 301 issue in *Wells*, it may have an impact on the *Wells* issue. GM seeks leave to file this brief to demonstrate how this case relates to the Fifth Circuit's *Wells* decision and other decisions involving promises made to employees who were covered by collective bargaining agreements at the time the promises allegedly were made.

Respectfully submitted,

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TABLE OF CONTENTS

	PAGE
INTEREST OF THE AMICUS CURIAE	1
INTRODUCTION AND SUMMARY OF ARGUMENT	2
ARGUMENT	3
CONCLUSION	10

TABLE OF AUTHORITIES

CASES:	PAGE
Allis-Chalmers Corp. v. *Lueck*, 471 U.S. 202 (1985) .	4, 9
Anderson v. *Ford Motor Company*, 803 F.2d 953 (1986), cert. denied, 483 U.S. 1011 (1987) ...	4, 5
Bale v. *General Telephone Co.*, 795 F.2d 775 (9th Cir. 1986)	5, 6
Caterpillar Inc. v. *Williams*, 482 U.S. 386 (1987) .	8
Chmiel v. *Beverly Wilshire Hotel Co.*, 873 F.2d 1283 (9th Cir. 1989)	6
Darden v. *United States Steel Corp.*, 830 F.2d 1116 (11th Cir. 1987)	7
DeLapp v. *Continental Can Co.*, 868 F.2d 1073 (9th Cir. 1989)	6
International Longshoremen's Ass'n v. *Davis*, 476 U.S. 380 (1986)	9
Mason v. *Continental Group, Inc.*, 763 F.2d 1219 (11th Cir. 1985), cert. denied, 474 U.S. 1087 (1986)	7
Redmond v. *Dresser Indus.*, 734 F.2d 633 (11th Cir. 1984)	7
Varnum v. *Nu-Car Carriers, Inc.*, 804 F.2d 638 (11th Cir. 1986), cert denied, 481 U.S. 1049 (1987)	7
Wells v. *General Motors Corp.*, 881 F.2d 166 (5th Cir. 1989)	1, 3, 5, 6
Young v. *Anthony's Fish Grottos, Inc.*, 830 F.2d 993 (9th Cir. 1987)	6

STATUTE:

Section 301 of the Labor Management Relations Act, 29 U.S.C. § 158 ..... *passim*

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BRIEF AMICUS CURIAE OF GENERAL MOTORS CORPORATION IN SUPPORT OF THE PETITIONER

General Motors Corporation ("GM") respectfully submits this brief as amicus curiae in support of the petition for a writ of certiorari.

INTEREST OF THE AMICUS CURIAE

As stated in the motion for leave to file this brief, GM's interest in this case arises from the fact that it has recently sought this Court's review in *Wells* v. *General Motors Corp.*, 881 F.2d 166 (5th Cir. 1989), petition for cert. filed, No. 89-____ (Dec. 27, 1989). In *Wells*, the court of appeals

held, *inter alia*, that Section 301 did not pre-empt a state law fraud and misrepresentation action related to "an extraneous promise" allegedly made to employees who were covered by a collective bargaining agreement. The alleged "promise" concerned the eligibility of the employees for future employment if they elected to leave their job pursuant to a negotiated Voluntary Termination of Employment Plan.

The petitioner in this case raises a closely related question: whether Section 301 pre-empts state law claims related to alleged pre-employment promises made to an individual who subsequently becomes a member of a bargaining unit covered by a collective bargaining agreement. Although resolution of that question would not necessarily resolve the Section 301 issue in *Wells*, it may have an impact on the *Wells* issue. GM seeks leave to file this brief to demonstrate how this case relates to the Fifth Circuit's *Wells* decision and other decisions involving promises made to employees who were covered by collective bargaining agreements at the time the promises allegedly were made.

INTRODUCTION AND SUMMARY OF ARGUMENT

Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185, creates federal jurisdiction over "[s]uits for violation of contracts between an employer and a labor organization * * *." For the past 30 years, this Court has consistently held that disputes between employers and employees relating to the terms and conditions of employment set forth in collective bargaining agreements must be governed by a uniform body of federal law. This case represents one of several recent attempts by employees

to circumvent that scheme of uniform federal law by alleging that their employers entered into (and breached) individual employment contracts separate and apart from the collective agreements that otherwise governed their employment. Such attempts generally have taken either the form seen in this case, where the employee alleges a pre-employment promise, or the form seen in *Wells* v. *General Motors Corp.*, 881 F.2d 166 (5th Cir. 1989), petition for cert. pending, No. 89-____, where the employees claimed that extra-contractual promises were made to them while they were employees covered by the union contract.

Several courts of appeals have held that state law actions relating to individual contracts brought by employees covered by collective bargaining agreements are pre-empted by Section 301. Other courts of appeals have reached the contrary conclusion. Review by this Court is necessary to resolve the conflict and to protect the realm of federal law and the primary role of arbitration in resolving disputes over labor contracts.

ARGUMENT

The courts of appeals are hopelessly divided on the issue of whether Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185, pre-empts state tort and contract claims based on alleged extra-contractual promises relating to the terms and conditions of employment of workers represented by unions. The Fifth and Eighth Circuits agree with the Third Circuit in this case that such claims are not pre-empted. The Ninth and Eleventh Circuits have reached the opposite conclusion. Review by this Court is necessary to resolve the conflict on this important and frequently recurring issue of federal law.

In this case, respondent Martin Berda, a former CBS employee, alleged that the company told him before he was hired that "he would be guaranteed employment with CBS for the reasonably foreseeable future." Pet. App. A-3. When he was laid off, Berda filed suit in state court, claiming that CBS had breached an oral contract and that it had committed fraud and negligent misrepresentation under state tort law. The Third Circuit, which characterized the case as involving a "circuit-splitting question" (*id.* at A-2), held that Berda's tort claims were not pre-empted by Section 301 because "Berda was not required to refer to the collective bargaining agreement in order to state his tort claim." *Id.* at A-17. In the court's view, the fact "that there was a provision of the collective bargaining agreement that also related to layoffs [is a fact] of no consequence, because Berda need not refer to the provision in the collective bargaining agreement in order to make out his claim." *Ibid.*

The Eighth Circuit reached the same conclusion in *Anderson* v. *Ford Motor Company*, 803 F.2d 953 (1986), cert. denied, 483 U.S. 1011 (1987), another case involving an alleged pre-employment promise. The plaintiffs were former Ford employees who claimed that when they were hired they were assured that they would not be bumped by laid-off employees from other plants around the country. When they were bumped, they sued, claiming that Ford's representations to them had been fraudulent and negligent. The court of appeals held that the tort claims were not pre-empted because "[u]nlike the tort claim for bad faith handling of an insurance claim considered in [*Allis-Chalmers Corp.* v. *Lueck*, 471 U.S. 202 (1985)] a claim of fraud does not derive from nor depend upon an underlying contract. Under Minnesota law, proof of fraud does not depend on the existence of any contractual rela-

tionship, nor do the standards for judging fraudulent misconduct derive from any contractually-established expectations of the parties." 803 F.2d at 957. The court acknowledged that the Ninth Circuit had reached the opposite conclusion on similar facts,[1] but held that "we do not agree with [the Ninth Circuit] that adjudication of these state law claims requires any significant reference to the terms of the collective bargaining agreement." *Id.* at 959.

The case directly of interest to GM involves not pre-employment promises, but rather promises that allegedly were made to individuals while they were employees covered by a collective bargaining agreement. In *Wells* v. *General Motors Corp.*, 881 F.2d 166 (5th Cir. 1989), the plaintiffs had left their employment at GM during a widespread reduction-in-force pursuant to a Voluntary Termination of Employment ("VTEP") agreement negotiated between the company and the union. The VTEP provided each of the employees with between $10,000 and $22,000 in special severance benefits. A few years later, when GM began hiring new workers at the employees' former plant, they found that they were ineligible for employment because they had accepted the VTEP benefits. They filed suit, claiming that GM had fraudulently or negligently assured them that they would be eligible for reemployment in the future.

The Fifth Circuit held that the employees' claims were not pre-empted by § 301 because they were not " '*substantially* dependent upon analysis of the terms' of the collective bargaining agreement" and because, in the court's view, the employees were not claiming that GM fraudulently misrepresented the terms of the VTEP, but that

[1] *Bale* v. *General Telephone Co.*, 795 F.2d 775 (9th Cir. 1986).

it "fraudulently *induced* individual employees to opt for the VTEP by making an extraneous promise concerning their future employment eligibility." The court acknowledged that plaintiffs' claims would nevertheless be pre-empted if the agreement governed the disputed issue, but held that "[a]fter careful review of the VTEP, we find no provision that reasonably might be construed to govern the issue of future employment eligibility, nor are there 'vague and ambiguous' references to eligibility that might be construed in GM's favor." 881 F.2d at 174.

The Ninth Circuit, on the other hand, has held that claims relating to pre-employment promises are pre-empted by Section 301. For example, in *Young* v. *Anthony's Fish Grottos, Inc.*, 830 F.2d 993 (1987), an employee (Young) claimed that when she was hired by her employer in 1985 she was assured that she could be discharged only for just cause even though under the collective bargaining agreement between the union and her employer she would be classified as a probationary employee subject to discharge at the company's discretion. When Young was fired without apparent cause, she sued, claiming fraud and misrepresentation. The Ninth Circuit held that her claims were pre-empted by Section 301. "Because any 'independent agreement of employment could be effective only as part of the collective bargaining agreement,' the CBA controls and the contract claim is preempted." 830 F.2d at 997. The court acknowledged that its decision conflicted with the Eighth Circuit's *Anderson* decision, but held that it was bound by its previous decision in *Bale* v. *General Telephone Co., supra.* See also *Chmiel* v. *Beverly Wilshire Hotel Co.*, 873 F.2d 1283, 1285-1286 (9th Cir. 1989); *DeLapp* v. *Continental Can Co.*, 868 F.2d 1073, 1074-1076 (9th Cir. 1989) (involving a promise allegedly made to an individual who was a member of the bargaining unit at the time).

The Eleventh Circuit's approach to the issue of extra-contractual promises focuses on whether the alleged promise was made when the employee was a member of the bargaining unit. If the state law suit alleges a pre-employment promise (as in this case), the action is *not* pre-empted by Section 301. *Varnum* v. *Nu-Car Carriers, Inc.*, 804 F.2d 638, 640 (11th Cir. 1986), cert. denied, 481 U.S. 1049 (1987). But if the promise was made to individuals who were bargaining unit employees at the time (as in *Wells*), the state law claims are pre-empted. *Darden* v. *United States Steel Corp.*, 830 F.2d 1116, 1119-1120 (11th Cir. 1987); *Mason* v. *Continental Group, Inc.*, 763 F.2d 1219 (11th Cir. 1985), cert. denied, 474 U.S. 1087 (1986); *Redmond* v. *Dresser Indus.*, 734 F.2d 633 (11th Cir. 1984). The Eleventh Circuit would thus agree with the Eighth Circuit's decision in *Anderson* and the Third Circuit's decision in this case (and would thus disagree with the Ninth Circuit in *Young* and *Bale*), but it would disagree with the Fifth Circuit in *Wells* because the plaintiffs in that case "were clearly employees within the meaning of the collective bargaining agreement when the alleged misrepresentations, which constitute the crux of their complaints, were made to them." *Darden*, 830 F.2d at 1119.

It is essential that this Court resolve the conflict among the circuits on an important and frequently recurring question of federal law. Disagreements between employers and employees are commonplace, and it would be the rare employee who could not package his complaint as an "independent" state law cause of action by alleging "extraneous promises" relating to—if not directly governed by—the terms of a collective bargaining agreement. As a result, state law claims such as these will continue to proliferate until this Court clarifies the governing principles. Nothing

could be more destructive of the goals Congress sought to achieve in enacting Section 301 than a rule facilitating attempts by individual employees to make end runs around the terms of collectively bargained agreements and around contractual dispute resolution mechanisms.

Accordingly, GM respectfully urges this Court to clarify the pre-emptive scope of Section 301 by granting either the petition in this case or the petition in *Wells*. In this regard, there are three respects in which *Wells* may be the more appropriate vehicle for this Court's review.

First, *Wells* involves extra-contractual promises allegedly made to employees *covered by a collective bargaining agreement*, while this case involves pre-employment promises. Whatever the status of state law claims in the latter context, in light of *Caterpillar Inc.* v. *Williams*, 482 U.S. 386 (1987),[2] the lower courts are in stark disagreement about the legitimacy of state law suits alleging that separate promises were made to members of the bargaining unit subject to the labor contract. Compare *Wells* with *Darden* and *DeLapp*.

Second, *Wells* involves a claim that the employer essentially misrepresented the terms of an agreement being negotiated with the union representing its employees, while this case involves an allegation that the employer

[2] In *Caterpillar*, this Court held that state law claims for breach of individual employment contracts were not "completely pre-empted" by Section 301 and thus were not removable to federal court. As in this case, the individual contracts were allegedly made before the employees became members of the bargaining unit and thus before they were covered by any collective bargaining agreement. In *Wells*, by contrast (as well as in the Eleventh Circuit's decision in *Darden* and the Ninth Circuit's decision in *DeLapp*) the alleged promises were made while the plaintiffs *were* members of the bargaining unit subject to the labor contract.

made promises regarding the employee's job security that were separate from and not dependent upon the terms of the collective bargaining agreement. Whatever the legality of the latter promises under Section 301, it is crystal clear that the state law claim in *Wells* "is extricably intertwined with consideration of the terms of the labor contract" (*Lueck*, 471 U.S. at 213).

Third, *Wells* presents two additional important issues of federal law that have divided the courts of appeals: whether state law claims that allege conduct "arguably prohibited" by Section 8 of the National Labor Relations Act, 29 U.S.C. § 158, continue to be pre-empted after this Court's decision in *International Longshoremen's Ass'n* v. *Davis*, 476 U.S. 380 (1986);[3] and whether Section 514(a) of the Employee Retirement Income Security Act, 29 U.S.C. § 1144(a), pre-empts state law claims relating to severance benefit programs initiated to deal with a single set of job terminations. Granting the petition in *Wells* would permit the Court to resolve all three issues in one case.

Whichever petition the Court grants, the Section 301 preemption issues presented by this case and *Wells* are of vital importance to employers, employees and unions throughout the country. The conflict among the circuits should not be permitted to remain unresolved.

[3] The Third Circuit declined to resolve the NLRA pre-emption issue in this case on the ground that the contention had not been passed upon by the district court. Pet. App. A-20.

CONCLUSION

The petition for a writ of certiorari should be granted. In the alternative, the petition should be held pending review of *General Motors Corp.* v. *Wells*, No. 89-____.

Respectfully submitted.

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